

# Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



## CCSI Policy Paper

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### Key Points

- 1 The Investor-State Dispute Settlement (ISDS) provision in trade and investment agreements poses a risk to the development, enforcement and application of domestic law;
- 2 Through ISDS, foreign investors can claim greater substantive and procedural rights than they are otherwise permitted under domestic law, undermining the balance between public and private rights that is set in the domestic legal framework;
- 3 Expanding ISDS by including it in new trade and investment agreements such as the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP) will expose the US government to new claims and liabilities challenging government action and inaction at all levels of government – local, state, and federal;
- 4 There is no compelling need that warrants accepting the risks that ISDS poses to the domestic legal system.

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## Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law

### Introduction

The Obama Administration is pushing to integrate investor-state dispute settlement (ISDS) in the trade and investment treaties it is negotiating with the EU (the Trans-Atlantic Trade and Investment Partnership Agreement, TTIP), the 11 other countries that form part of the proposed Trans-Pacific Partnership agreement (the TPP), and the bilateral treaty with China. While the ISDS mechanism is in the US Model Bilateral Investment Treaty, as well as in many other investment treaties in force, the serious shortcomings of ISDS in its current form are becoming evident. Multinational companies are increasingly using ISDS to challenge the legal and regulatory systems and policy choices of the contracting states, posing a serious and growing risk to the ability of states to govern in the public interest.

ISDS is a mechanism that allows foreign individuals and foreign companies to sue host-country governments through ad hoc arbitration proceedings rather than through normal domestic administrative and judicial channels.

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ISDS has several notable features:<sup>i</sup>

- Foreign investors alone (including their subsidiaries and shareholders) are able to initiate claims against the government; the government cannot initiate an ISDS proceeding.
- The decision-makers in these ISDS proceedings are private arbitrators appointed on a case-by-case basis to decide the investors' claims against the host government.
- When deciding the case, the substantive law the arbitrators apply is not the domestic law of the "host" state that normally governs the investment. Rather, it is the law of the treaty, as interpreted by the arbitrators.
- Treaty standards are typically drafted in very vague, broad terms, giving arbitrators in each case substantial latitude to determine what the standards mean in practice; because there is no appellate mechanism, and there are strong rules on enforcement of awards, there are only very limited checks on tribunals' powers of interpretation.
- If the arbitrators find that the government violated the treaty, they can order the government to pay the investor substantial damages. Cases to date have included awards of millions or even billions of dollars for breaching the treaty. Arbitrators can and have also ordered "injunctive relief", often in the form of interim measures, effectively mandating governments to take, or not take, certain actions.<sup>ii</sup>
- There are limited avenues to challenge arbitral awards; errors of law or fact are typically not grounds for overturning the decisions. If a tribunal issues an award against the government, courts of most countries are required to enforce it.

These and other aspects of ISDS create a privileged and powerful avenue through which foreign investors can challenge the actions of host governments whether at the local, state, or federal level, and whether taken by the executive, legislative, or judicial branch. ISDS provisions had long been relatively unknown and unused features of treaties, but over the past fifteen years, companies have increasingly become aware of them, and the number of claims against governments has risen dramatically.

Available evidence regarding the approximately 600 known ISDS suits filed to date indicate that investors can use the mechanism to contest a virtually unlimited range of actions (or inactions), including measures relating to taxation, environmental regulation, tariffs for water and electricity, health insurance regulation, and health and safety regulations of pharmaceutical imports, among others. Foreign investors have also used investment treaties to challenge unfavorable court decisions issued in litigation between the investors and third parties such as industry competitors or tort plaintiffs. Just a small sample of ISDS cases include those seeking compensation for:

- New and stronger environmental regulations (e.g., *Glamis Gold v. United States*;<sup>iii</sup> *Lone Pine v. Canada*<sup>iv</sup>);
- Termination of contracts with investors in accordance with contractual provisions (e.g., *Occidental v. Ecuador II*<sup>v</sup>);

- Revocation or invalidation of permits authorizing investors' operations (e.g., *Renco v. Peru*<sup>vi</sup>; *Infinito Gold v. Costa Rica*<sup>vii</sup>);
- Decisions not to grant permits or not to go ahead with projects (e.g., *Pac Rim v. El Salvador*<sup>viii</sup>; *Bilcon v. Canada*<sup>ix</sup>; *PSEG v. Turkey*<sup>x</sup>; *MTD v. Chile*<sup>xi</sup>);
- Changes to fiscal regimes (e.g. *Perenco v. Ecuador*<sup>xii</sup>; *Burlington v. Ecuador*<sup>xiii</sup>; and *Occidental v. Ecuador* <sup>xiv</sup>);
- Requirements to purchase local goods and services or invest in research and development (e.g., *Mobil v. Canada*<sup>xv</sup>);
- Obligations of states to respond to, prevent, or stop harm caused by third persons or to affect outcome of litigation with third persons (e.g., *RDC v. Guatemala*<sup>xvi</sup>; *Chevron v. Ecuador II*<sup>xvii</sup>; *Infinito Gold v. Costa Rica*<sup>xviii</sup>; *Eli Lilly v. Canada*<sup>xix</sup>);
- Actions to change or not change tariffs for public services (*Teco v. Guatemala*<sup>xx</sup> *Iberdola v. Guatemala*<sup>xxi</sup>);
- Judicial interpretations of the scope of patent protections for pharmaceutical products (*Eli Lilly v. Canada*<sup>xxii</sup>);
- Phase-out of nuclear power (*Vattenfall v. Germany*<sup>xxiii</sup>);
- Health measures such as anti-tobacco legislation and regulation (*Philip Morris v. Australia*<sup>xxiv</sup>; *Philip Morris v. Uruguay*<sup>xxv</sup>); and
- Attempts to restructure sovereign debt (*Abaclat v. Argentina*<sup>xxvi</sup>; *Ambiente Ufficio v. Argentina*<sup>xxvii</sup>; *Alemanni v. Argentina*<sup>xxviii</sup>).

As this Policy Paper discusses, ISDS provides significant substantive and procedural rights to individuals and corporations based solely on their foreign nationality, and outsources development and interpretation of law to private arbitrators insulated from crucial checks and balances. Through this grant of rights and transfer of lawmaking power, ISDS threatens to undermine legal systems and policymaking at the domestic level.

While the US Government has tried to dispel concerns about including ISDS in future trade and investment agreements, its assertions do not adequately consider the issues posed by ISDS. Rather than promoting ISDS, the US Government should opt for other methods of protecting investor rights and ensuring government compliance with treaty commitments.

### Granting Protections for Foreign Investors

Throughout the discussion below it is important to keep in mind the context in which the Administration is proposing to expand ISDS. The US and many other governments have taken various measures to attract and facilitate investment, on the basis that investments (both foreign and domestic) and general business activities are important for sustained economic growth.

In order to facilitate and encourage such investment, the US legal system has evolved to protect investors' rights and interests from improper treatment and undue interference by government, allowing foreign and domestic individuals and entities in the US to challenge government conduct on myriad constitutional, statutory, tort, and contract-based grounds.<sup>xxix</sup>

Nevertheless, as the domestic legal framework has evolved to protect investors' economic interests, it has also evolved to reflect the fundamental importance of the government's ability to regulate investors and their activities for the safety, health, security, and social interests of other parties. The resulting balance that has been struck in domestic law is reflected in a host of complex and detailed substantive and procedural rules governing who can bring claims against the government, under what circumstances, through what processes, for what types of harms, and for what remedies. Moreover, this balance is a "living" balance in that the democratic institutions establishing this framework can contribute to its continual evolution and refinement over time in response to changes in knowledge, needs and priorities.

However, ISDS completely circumvents the very balance between private and public rights that has developed in the domestic context, and undermines the institutions that continue to shape it. Importantly, excluding ISDS in US treaties would not undo protection of investors' economic interests in the country. Foreign investors have access to domestic courts, where domestic investors also adjudicate any disputes.

Some commentators, including President Obama, have noted that although ISDS is not necessary for investors investing in the US, it is crucial to include it in treaties with other countries to protect the economic interests of US investors abroad, particularly in countries where there may be less developed protections for foreign investors. There are a number of responses to this argument.

First, the costs to the US of affording investors the privilege of circumventing domestic courts in host countries are high, particularly in light of such weak evidence of ISDS's necessity. Subnational and national jurisdictions around the world are fiercely competing to attract and keep investment so as to benefit from the jobs, technology, and capital such investment can inject into their economies. To engage in this competition, governments are using promotional tools, struggling to improve their performance on governance indices, and granting fiscal, financial and regulatory incentives to make themselves attractive destinations for foreign investors. Not surprisingly, research has indicated that in non-OECD countries, foreign multinational enterprises already exercise significantly greater power vis-à-vis the government than domestic companies.<sup>xxx</sup> In fact, there is evidence that the existence of a treaty with ISDS is not even influential in investors' decisions to invest.<sup>xxxi</sup> In light of these dynamics, it is far from clear that a supranational arbitration system is also needed to further discipline governments and ensure that they provide investment-friendly destinations.

Second, investors concerned about their ability to obtain justice in the host state's legal environment can secure political risk insurance from the market to protect against losses suffered by various types of wrongful government conduct.<sup>xxxii</sup> Political risk insurance also offers a policy

benefit investment treaties do not: as compared to investment treaties – which compensate for political risk at a flat, zero-premium rate that does not take into account the investment climate or quality of governance in the host country – political risk insurance can send market signals to investors and host countries about the types of conduct that do and do not establish a sound and predictable business environment and that should be rewarded by increased investment. If, for example, a foreign jurisdiction is deeply corrupt and lacking an independent judiciary, investment treaties should not reward that jurisdiction by subsidizing investment into it.

A third and final key point is that ISDS lessens the pressure on governments to improve their domestic legal systems for the benefit of all. To the contrary, the risk of liability for judicial decisions, legislative changes and regulatory acts that negatively affect the economic interests of foreign investors may well create a “regulatory chill,” stifling important legal reforms in the general public interest. Instead of prioritizing select rights for foreign investors, the international community should be creating incentives for all governments to strengthen their domestic legal frameworks so that they are capable of developing and enforcing laws that protect *and* regulate business activities.

### **An Unprecedented and Dangerous Expansion of ISDS Coverage**

As experience under the NAFTA shows, foreign investors will use ISDS when available, even if the host government has a stable and well-functioning domestic legal system through which investors could pursue their claims. Indeed, the risk of being sued is correlated with the amount of foreign investment covered by treaties,<sup>xxxiii</sup> which is particularly important for the US given the number of new investors that would be covered by TTIP and TPP alone.

The eight largest sources of foreign investment in the US – Canada, France, Germany, Japan, Luxembourg, the Netherlands, Switzerland, and the United Kingdom – accounted for roughly 80% of the approximately \$2.8 trillion of foreign direct investment in the US at the end of 2013.<sup>xxxiv</sup> Of those eight, the United States currently has a treaty with only one – Canada – that permits ISDS claims against the United States. Investment from Canada accounted for less than 10% of foreign direct investment in the United States.<sup>xxxv</sup>

If, however, the United States concludes the TTIP and TPP and includes ISDS in each, investors from seven of the eight major inward investing countries will be protected, who together represented over 70% of FDI in the US at the end of 2013.<sup>xxxvi</sup> This does not even include investors from countries other than those eight that would also be covered under the TTIP and TPP, or those that would be covered under the treaty with China.

In numerical terms, fewer than 10,000 investors in the United States are currently covered by an investment treaty with an ISDS provision. If the TPP were to include ISDS, that number would nearly double. With the TTIP, that number would nearly quadruple. If both treaties were to come



into force, the US's exposure would be nearly five times greater than it is at present, not including investors potentially covered under a BIT with China.<sup>xxxvii</sup> And in addition to the sheer number of investors that would be covered by a treaty, the rise of third-party funding for investor claims, which reduces the financial risk for investors bringing those lawsuits, will also likely increase the overall number of cases brought by investors.

## US Experience with ISDS

The United State Trade Representative (USTR) often responds to concerns about ISDS by stating that the US has yet to lose an ISDS case.<sup>xxxviii</sup> This is little comfort for two reasons. First, as indicated above, the number of ISDS disputes is correlated with the number of covered investors, and under TTIP and TPP, the number of covered investors would quintuple, considerably increasing the US's exposure and potential liability under ISDS.

Second, even in cases in which the US has ultimately won, it has lost on important issues. For example, in the recently decided dispute, *Apotex Holdings v. United States*, the tribunal rejected the US's position on a key jurisdictional point, thereby significantly expanding the US's exposure to future ISDS claims. In that case, Apotex Holdings brought an ISDS claim under the NAFTA, seeking compensation for actions taken by the US Food and Drug Administration (FDA) to restrict imports into the US of "adulterated" drugs that were manufactured by Apotex Holding's subsidiaries in Canada. The US FDA had restricted those imports into the US after finding that Apotex Holding's Canadian manufacturing facilities had repeatedly and seriously violated good manufacturing practice standards.

The US government argued to the tribunal of arbitrators that to allow the Canadian drug company to use ISDS to challenge the FDA's enforcement of health and safety rules against Canadian drug manufacturers *in Canada* would be to "impermissibly ... expand the boundaries of NAFTA Chapter 11 far beyond anything the NAFTA Parties contemplated when they concluded Treaty."<sup>xxxix</sup> Such claims, the US argued, "are manifestly outside the scope of [the NAFTA's investment chapter] and should be dismissed for lack of jurisdiction."<sup>xl</sup> The tribunal disagreed, and allowed the case to proceed, signaling to other foreign manufacturers that ISDS can be a viable way to challenge import restrictions imposed by US regulators for health, safety, or other legitimate reasons.<sup>xli</sup>

ISDS tribunals have similarly declined to accept the US's and its treaty parties' interpretations and clarifications of the meaning of substantive treaty standards.<sup>xlii</sup> This is important to understand as it illustrates the significant and unchecked power of tribunals to interpret treaty provisions differently from the state parties' stated understanding of the treaty text. Once states delegate such considerable powers to arbitrators to interpret and apply investment provisions through ISDS, those powers are exceedingly difficult to rein in.

In light of the coming sea change in exposure, it is crucial to acknowledge the implications of ISDS for the domestic legal system and domestic liability. Note that the key concern is *not* that the government will be challenged for its conduct; as noted above, challenges to a broad range of government actions and inactions are permitted under domestic law, and are critical for both holding the government accountable for harms and providing a mechanism for constant reform and upgrading of the domestic legal system. Rather, the key concern about ISDS is that it allows foreign investors – and foreign investors alone – to circumvent and override the otherwise applicable domestic legal framework, undermining domestic law and the rights and interests of others, including domestic companies and state and local regulators. Moreover, it outsources decisions regarding complex questions of law and policy to private arbitrators who lack the democratic legitimacy and are free from the checks and balances that govern administrative, judicial and legislative actors.

### The “No Greater Substantive Rights” Question

To address concerns about ISDS, the US Government has insisted that the treaties are “designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and US law.”<sup>xliii</sup> Yet, as explained below, even if that is the intent, it is simply not the reality.

In support of its assertion that investment treaties provide no greater protections than those under domestic law, the USTR has explained that particular treaty standards merely “mirror” US domestic standards of protection. For instance, the USTR asserts, the treaty obligation not to “expropriate” property is akin to the Fifth Amendment protection against uncompensated takings in the US Constitution.<sup>xliv</sup> But while some of the concepts are similar, the means by which they are judged and applied are not the same as under U.S. law.

Identifying a “taking” under US Constitutional law is a notoriously complex undertaking, governed by several different tests and a wealth of jurisprudence, providing crucial guidance and rules on how to interpret and apply those tests.<sup>xlv</sup> While one of these domestic law tests – the “*Penn Central*” test -- is roughly reflected in the US’s investment treaties, the other tests are not; moreover, when applying the treaty’s version of the vaguely worded “*Penn Central*” test, tribunals are not bound by crucial domestic precedent. Consequently, the line tribunals draw between legitimate regulatory conduct and expropriations requiring compensation can be very different from that drawn by domestic authorities, and can result in greater rights being granted to foreign investors than would be recognized under domestic law. The mere facial similarity between the property rights protections in treaties and domestic law is far from a guarantee that treaty rights provide no stronger substantive protections than the domestic system.

The “fair and equitable treatment” (FET) treaty standard, another common feature of investment treaties, raises similar issues. Although the USTR has explained that FET is simply a protection

against “denial of justice” in “criminal, civil, or administrative adjudicatory proceedings,”<sup>xlvi</sup> the obligation has frequently been interpreted by tribunals to go well beyond such a basic “denial of justice” standard. Rather, according to tribunals, the FET obligation is a type of “catch-all” provision that can be used to penalize governments for a wide range of conduct otherwise legitimate under domestic law.

For example, a tribunal interpreting the “fair and equitable treatment” (FET) obligation in the US-Ecuador investment treaty explained that the FET standard “certainly” imposes an “obligation not to alter the legal and business environment in which the investment has been made.”<sup>xlvii</sup> Similarly, when interpreting the FET standard in the US’s agreement with Turkey, the tribunal proclaimed that the obligation was “seriously breached” as a result of “continuing legislative changes.”<sup>xlviii</sup> In marked contrast to those pronouncements of treaty law, US domestic law does not provide investors with such broad protections against the risk of legal change.<sup>xlix</sup>

The FET and non-discrimination standards in investment treaties have also been interpreted and applied to protect against “manifestly arbitrary” and discriminatory conduct. Under these interpretations, the treaty standards may be seen as parallel to protections provided under the federal Administrative Procedures Act (APA)<sup>l</sup> and state law analogues. Yet, when scrutinizing agency conduct under these treaty standards, tribunals operate free of the myriad precise rules that govern – and constrain – judicial review of agency conduct at the domestic level.

This difference has significant ramifications. In particular, the APA and case law interpreting it establish a nuanced scheme governing the grounds for challenging agency action, the means to do so, and the remedies available when challenges are successful. The APA also provides that judicial review of agency action may be barred if either restricted by statute or committed to agency discretion by law.<sup>li</sup> As stated by the Supreme Court, the APA’s principle purpose is to “protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements, which courts lack both expertise and information to resolve.”<sup>lii</sup> Consequently, when domestic actors seek to challenge agency action under the APA, their ability to successfully do so is subject to important statutory limits designed to restrict judicial interference with specialized agency knowledge.

Foreign investors seeking to contest adverse agency action under ISDS, however, are not similarly limited by the APA or other statutes or doctrines governing judicial review of agency action.<sup>liii</sup> When reviewing the investors’ claims, tribunals are not bound by the detailed substantive principles of US law and regulation. Accordingly, tribunals have availed themselves of their power to conduct more searching reviews of agency action and order different remedies as compared to domestic courts.

For example, in *Apotex Holdings v. United States*, the investors used ISDS to challenge the US FDA’s decision to impose an “Import Alert” on adulterated drugs their affiliates manufactured in Canada. As part of their argument, the investors alleged that the FDA violated the NAFTA’s non-discrimination obligations by restricting imports of their affiliates’ adulterated drugs but not



taking similarly strong enforcement action against other non-compliant companies. According to Apotex Holdings and its affiliates, they should not have been penalized by the FDA when other substandard performers were not.

It is questionable as to whether such a challenge to the FDA's enforcement actions would even have been permitted under domestic law. The Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and unsuitable for judicial review under the APA:<sup>liv</sup>

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>lv</sup>

The foreign investors' claims before the ISDS tribunal, however, were unconstrained by these domestic law rules. The tribunal's review of the FDA's actions and inactions—contrary to standard practice under the APA<sup>lvi</sup>—went beyond the administrative record and was unrestrained by any clear standards confining the tribunal's review of the facts or law.<sup>lvii</sup>

Ultimately, the tribunal agreed that the FDA had justifiable reasons for treating the Canadian manufacturing facilities more harshly than other drug manufacturers found to have similar violations. Nevertheless, the US' win on that point should not mask the more fundamental meaning of the case—namely, that future claimants who want to challenge agency action can bypass the APA's more specific rules that might restrict such a review and instead have a private panel of party-appointed arbitrators scrutinize the agency's conduct on grounds and to an extent unallowable under domestic law.

The range of agency actions that companies could dispute through this route is broad. Within the specific area of "Import Alerts," for example, one could foresee a rise in the use of ISDS to challenge FDA decisions restricting entry of unsafe drugs, food, and other products following the decision in *Apotex* that left the door open to such lawsuits. The implications of this are particularly significant given that imports of foreign drugs and food items are likely to increase with the TPP and other trade and investment agreements.

The majority decision in *Bilcon v. Canada* provides another example of an ISDS tribunal reviewing administrative decisions without the standard domestic restraints, and offering remedies otherwise not available under domestic law. In that case, the ISDS tribunal determined that it was

“arbitrary” and a violation of the fair and equitable treatment standard<sup>lviii</sup> for a panel of experts to consider “core community values” as part of the experts’ assessment of a proposed project’s impacts on the human environment, economy, life style, social traditions, or quality of life.<sup>lix</sup> The arbitrators are still deciding how much money to award the investor as damages.

The ISDS decision reflects no deference to the expert panel’s understanding of the environmental impact assessment regulations governing that panel’s task. Rather, the decision evidences a willingness of international tribunals to stand in for domestic agencies and courts and assume the role of developing and interpreting principles on proper administrative conduct. As the dissenting arbitrator said, the decision illustrates not only how ISDS tribunals take into their own hands the issue of proper application of domestic environmental law, but also how their decisions can “import[] a damages remedy that is otherwise not available”, with potentially costly implications for governments.<sup>lx</sup>

Even if the treaty were to try to prescribe specific substantive rights that were no greater than those under domestic law, tribunals – typically comprised of arbitrators who are not experts in domestic law – may err in their analysis of what that domestic law is or how it would apply to the case before the tribunal. And in such a case, the government would not be able to appeal any such decision on the ground that the arbitrators got the law wrong. The government would remain bound by the tribunal’s interpretation.<sup>lxi</sup>

Consequently, given the wide and largely unchecked power arbitrators have to interpret the rights and protections offered in investment treaties, and the absence of specific doctrines in international investment law, treaties *do* afford “greater substantive rights” to foreign investors than are provided for investors or other constituents under domestic law.

### **The Bigger Picture: Beyond a Misleading Focus on “Substantive Rights”**

Equally importantly, the Administration’s focus on whether the treaties give greater “substantive” rights is misleading; it ignores the crucial and often determinative role of procedural law in shaping the outcomes of claims and defenses.

Indeed, the line between “substantive” and “procedural” law is infamously problematic. It is tellingly “often described with unflattering adjectives such as ‘vague,’ ‘unpredictable,’ ‘imprecise,’ ‘amorphous,’ ‘unresolvable,’ ‘unclear,’ ‘chameleon-like,’ ‘murky,’ ‘blurry,’ ‘hazy,’ and ‘superbly fuzzy.’”<sup>lxii</sup> Many rules typically labeled “procedural” can affect the outcome of substantive claims. Indeed, “[t]o speak of procedural and substantive rules as if each can be defined independently of the other is inaccurate. Law is the product of an interaction between substance and procedure.”<sup>lxiii</sup>

## Forum Shopping to Gain Access to ISDS Procedures

Domestic law includes a complex set of “procedural” principles and rules that are often determinative of the success of judicial claims. These include such questions as:

- Who can bring claims? (e.g., do doctrines of standing prevent the suit?)
- Under what circumstances? (e.g., do issues of ripeness, statutes of limitation, or exhaustion restrict the claims? are all indispensable third parties joined so that the case can proceed?)
- What level of scrutiny or deference must the court or tribunal accord? (e.g., is the claim challenging an administrative decision, a lower court decision on an issue of law, or a lower court decision on an issue of fact?)
- What rules of evidence and privileges apply? (e.g., how do applicable rules on taking and reliability of evidence impact claims or defenses? what is the relevance of privileges like the “deliberative process privilege”?)
- What can the court consider? (e.g., can it consider new evidence, only evidence in the administrative record, only evidence introduced at trial?)
- What remedies are available? (e.g., can the court order removal of the measure, declaratory relief, compensatory damages, or punitive damages?)
- Do doctrines of abstention limit claims or require them to be decided in a particular forum?

The strict contours of these questions that have been formed over centuries in US domestic law do not apply in ISDS. When any of these procedural barriers would be unfavorable to a foreign investor’s position (or if an investor loses in domestic courts for the same reason), a foreign investor with access to ISDS can bypass these rules by bringing its case to international arbitration in search of a better outcome.<sup>lxiv</sup>

Table 1 below illustrates how foreign investors may “forum shop” in this manner by repackaging domestic law claims as treaty claims. Takings claims under US federal law could be framed, for example, as expropriation claims under a treaty; claims of substantive due process under US law could be framed as expropriation claims, fair and equitable treatment claims, or “umbrella clause” claims under a treaty; and challenges under the US Administrative Procedures Act or state analogues could be framed as expropriation, fair and equitable treatment, non-discrimination, and umbrella clause claims under a treaty.

Even if it could be said that, in theory, these purely *substantive* standards of protection under investment treaties were the same as those under domestic law, the procedural avenues through which those standards are enforced can render the substantive standards different – and greater – in practice. This in turn exposes the government to litigation and liability to an extent not permitted under domestic law and undermines the government’s ability to take regulatory and other actions that are adverse to foreign investors without the risk of having to pay costly compensation.

**Table 1. Parallels between Domestic and Treaty Law Claims**

US Domestic Law Claims against Govt.	Treaty Claims against Govt.
Takings	Expropriation
Substantive due process	Expropriation Fair and equitable treatment Umbrella clause
Procedural due process	Fair and equitable treatment
Contract breach	Expropriation Fair and equitable treatment Umbrella clause
Challenges to administrative or regulatory actions	Expropriation Fair and equitable treatment National treatment and MFN treatment Umbrella clause
Tort claims	Fair and equitable treatment

### Highlighting the Importance of Procedure: The Role of Abstention Doctrines

Abstention doctrines help to illustrate these issues in more detail.

Under domestic law, abstention doctrines are relevant when the same or similar issues are being brought, may be brought, or have been brought in different court systems (e.g., state or federal), and there is a question about the proper place to decide the matter.<sup>lxv</sup> Abstention doctrines, like the *Rooker-Feldman* doctrine, reflect the principle of federalism embodied in the domestic legal system. *Rooker-Feldman* bars “cases brought by state-court losers complaining of injuries by state-court judgments” who then seek federal “district court review and rejection of those

judgments.”<sup>lxvi</sup> Only the US Supreme Court has the discretion to review state court judgments,<sup>lxvii</sup> federal district courts do not.

Assume, for example, that an individual sued a foreign-owned company arguing that the company caused her harm as a result of the company’s emission of pollutants into her source of water. If she lost her case in the state court system, *Rooker-Feldman* would prevent her from seeking to undo the state court judgment by turning to federal district court.<sup>lxviii</sup> She would also not be able to turn to a mechanism like ISDS to challenge the decision. The most she could hope for would be discretionary review by the US Supreme Court, a highly unlikely scenario in light of the limited percentage of cases the Court agrees to hear.

In contrast, if the company lost the state court case and was ordered to pay the plaintiff damages, the company could seek to challenge that state court decision by bringing a claim against the US government in ISDS and alleging that the procedure or substance of the domestic court proceedings violated international law.<sup>lxix</sup> The ISDS tribunal would be the final arbiters of the legitimacy of state court proceedings and outcomes, and would not only have the authority to award damages for the unfavorable state court decision, but also would not be obligated to apply domestic law in adjudicating the dispute.

ISDS thus becomes a mechanism through which foreign investors alone have an extra opportunity to contest and seek compensation for unfavorable outcomes from state-court litigation. This increases the pressure foreign investors with access to ISDS can put on legal doctrines and decisions that are adverse to their positions in legal disputes with other individuals, organizations, state or local government entities, domestic companies, or foreign companies not covered by investment treaties. By providing select foreign investors this recourse to ISDS, law becomes asymmetrical, favoring those foreign investors over other interests and parties.<sup>lxx</sup>

Additionally, by freeing foreign investors from restraints imposed by abstention doctrines, providing those investors unique access to investment arbitration, and conveying powers on arbitrators to scrutinize conduct of any state actor, ISDS undermines the authority of state administrative and judicial bodies to develop, interpret and apply the law.

The *Burford* abstention doctrine illustrates how ISDS shifts this authority to develop, interpret and apply law. Under the *Burford* abstention doctrine, the general rule is that where timely and adequate state-court review of a state agency action is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies in two circumstances:<sup>lxxi</sup>

- (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or
- (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>lxxii</sup>



The doctrine is based on the premise that “[d]elay, misunderstanding of local law, and needless federal conflict with state policy,” would be “the inevitable product” of a system in which losing parties before state administrative agencies in these sensitive areas of law turned to federal courts for relief.<sup>lxxiii</sup>

**Table 2. Comparing Substantive and Procedural Issues in Domestic and Treaty Law: select examples**

Issue	US investors	Foreign investors under ISDS
<b>Bringing claims</b>	<p>e.g.,</p> <ul style="list-style-type: none"> <li>• must comply with requirements to exhaust local remedies;</li> <li>• suits by shareholders for harms to the company limited;</li> <li>• case may not be able to proceed if indispensable 3<sup>rd</sup> parties are not able to join.</li> </ul>	<p>e.g.,</p> <ul style="list-style-type: none"> <li>• claimants are not subject to requirements to exhaust local remedies;<sup>lxxiv</sup></li> <li>• tribunals have given shareholders broad rights of standing to bring claims for harms to the company;<sup>lxxv</sup></li> <li>• cases may proceed without similar protections for rights and interests of relevant 3<sup>rd</sup> parties.</li> </ul>
<b>Causes of action and defenses</b>	Claims against government defined by domestic law (APA, takings claims, due process challenges, breach of contract, tort, etc.)	Claims against government brought under treaty standards. Legitimacy of the government action under domestic law is not a defense.
<b>Abstention for policy purposes</b>	Federal courts may abstain from taking jurisdiction for various policy reasons including to respect principles of federalism. Under the <i>Burford</i> doctrine, for example, federal courts may abstain from taking the case when it deals with a sensitive matter of state or local policy.	There is no doctrine of abstention for policy grounds. Tribunals with jurisdiction hold they must hear claims irrespective of the domestic policies at issue or availability of other fora where the claims could be heard.
<b>Evidentiary issues</b>	For policy purposes, statutory and judicial doctrines like the “deliberative process privilege” have been created to guard against discovery and use of certain government information in litigation against the government.	Tribunals <i>may</i> be guided by or apply domestic rules on privilege or taking or admission of evidence, but are not bound by them. <sup>lxxvi</sup>

Unlike federal courts, arbitral tribunals hearing ISDS claims do not apply this abstention doctrine. The authority that the *Burford* doctrine gives state institutions to shape law and policy can thus be overridden by ISDS tribunals vested with the power to determine the legitimacy of decisions taken at any level of government. As a result, when faced with an adverse decision by a local or state administrative agency, a company covered by an investment treaty could simply opt out of the state's legal system and take its dispute to international arbitration, frustrating "state efforts to establish a coherent policy with respect to a matter of substantial public concern."<sup>lxxvii</sup>

## The Well-Known Problem with Greater Rights

Individually and together, vague substantive treaty standards and the ISDS mechanism through which they are interpreted and applied, have given foreign investors greater rights than they would otherwise enjoy under domestic law. This system offends principles behind long-settled US doctrine.

More than 75 years ago, in the seminal case of *Erie v. Tompkins*, the Supreme Court expressly denounced this type of two-tiered legal system, overruling previous doctrine that had enabled non-citizens of any US state to access better rights than citizens by electing to take their claims to federal rather than state court.<sup>lxxviii</sup> Although that two-tiered system had been designed to prevent "discrimination in state courts against those not citizens of the State,"<sup>lxxix</sup> it instead "introduced grave discrimination by non-citizens against citizens" because it gave non-citizens the "privilege of selecting" whether to take their disputes to federal courts and benefit from more favorable federal law.<sup>lxxx</sup>

Such a system, the Supreme Court declared in 1938, "rendered impossible equal protection of the law" and gave rise to injustice and confusion.<sup>lxxxi</sup>

ISDS raises exactly the same issues. Based on the fear that domestic court systems would be biased against non-citizens, ISDS allows non-citizens (and only non-citizens) access to preferential rights and processes, giving foreign companies and their shareholders and subsidiaries the same "privilege of selection" that the Supreme Court struck down in 1938.<sup>lxxxii</sup>

## Recommendations

A 21st century trade agreement should not undo policies and legal frameworks that have been and continue to be developed and refined through democratic processes, transparent courts and administrative systems checked and balanced by the separation of powers. And a 21st century legal mechanism should not undo those frameworks especially for a specific set of actors based

solely on their nationality. The agreements being negotiated by the Administration, however, threaten to do just that.

Some reforms have been proposed to address the growing public concerns about ISDS. The European Commission, for example, recently announced its desire to move toward establishing a standing investment court and an appellate mechanism. While those reforms would go a long way toward addressing *other* concerns about ISDS that are not addressed in this paper—for instance, the potential bias of arbitrators and the inconsistency of decisions—they do not address the particular concern addressed here, namely the ability of foreign investors to challenge regulations, domestic court decisions, and other administrative acts outside of the domestic legal system, undermining substantive and procedural US law and the law-making process.

Rather than further entrenching ISDS through TPP, TTIP, or other treaties, the US should take the more considered step to remove ISDS from future agreements. As an alternative to ISDS, states could agree on state-to-state consultation and dispute settlement mechanisms like those commonly used to settle *trade* disputes under international treaties. Extensive experience with state-to-state dispute settlement mechanisms in trade disputes should reassure ISDS supporters who contend that resolving investment disputes through state-to-state procedures would undesirably “politicize” those disputes. Moreover, while “the de-politicisation thesis [in favor of ISDS] is widely shared amongst lawyers, it has never been subject to any rigorous empirical testing.”<sup>lxxxiii</sup>

In the absence of ISDS, investors also have access to political risk insurance that protects them from losses arising out of expropriation, breach of contract, and denial of justice, the same types of losses that are covered under investment treaties.

Finally, to the extent foreign investors cannot get efficient or fair relief in the legal system of host states, trade and investment treaties can use cooperative institutional mechanisms to identify the gaps and issues in those legal systems and help to address them. Not only will such efforts help to improve dispute settlement between investors and states, it will also enable foreign investors to enjoy greater legal security when dealing with consumers, suppliers, and competitors, and will more broadly improve the investment climate of the host country.

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<sup>i</sup> These features are present in investment treaties the US has already concluded and in the leaked chapter of the TPP.

<sup>ii</sup> See e.g., *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, May 8, 2009; *Chevron v. Ecuador*, PCA Case No. 2009-23, Order for Interim Measures, February 9, 2011.

<sup>iii</sup> Award, June 8, 2009 (deciding in favor of the US on the merits).

<sup>iv</sup> This case is still pending.

<sup>v</sup> ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 (deciding against Ecuador, and ordering payment of roughly USD 1.8 billion plus interest).

<sup>vi</sup> ICSID Case No. UNCT/13/1 (case still pending).

<sup>vii</sup> ICSID Case No. ARB/14/5 (case still pending).

<sup>viii</sup> ICSID Case No. ARB/09/12 (dismissed on jurisdiction).

- <sup>ix</sup> PCA Case No. 2009-04, Award, Mar. 17, 2015 (deciding against Canada on the merits).
- <sup>x</sup> ICSID Case No. ARB/02/5 (deciding against Turkey on the merits).
- <sup>xi</sup> ICSID Case No. ARB/01/7, Award, May 25, 2004 (deciding against Chile on the merits).
- <sup>xii</sup> ICSID Case No. ARB/08/6, Award, Sept. 12, 2014 (deciding against Ecuador on the merits).
- <sup>xiii</sup> ICSID Case No. ARB/08/5, Award, Dec. 14, 2012 (deciding against Ecuador on the merits).
- <sup>xiv</sup> LCIA Case No. UN3467, Award, July 1, 2004 (decided against Ecuador on the merits).
- <sup>xv</sup> ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, and Award, Feb. 20, 2015 (deciding against Canada on the merits).
- <sup>xvi</sup> ICSID Case No. ARB/07/23 (deciding against Guatemala on the merits but not addressing the question of whether Guatemala violated obligations to protect against harm caused by third parties).
- <sup>xvii</sup> PCA Case No. 2009-23 (case still pending).
- <sup>xviii</sup> ICSID Case No. ARB/14/5 (case still pending).
- <sup>xix</sup> ICSID Case No. UNCT/14/2 (case still pending).
- <sup>xx</sup> ICSID Case No. ARB/10/23, Award, Dec. 19, 2013 (deciding against Guatemala on the merits).
- <sup>xxi</sup> ICSID Case No. ARB/09/5, Award, Aug. 17, 2012 (deciding in favor of Guatemala).
- <sup>xxii</sup> ICSID Case No. UNCT/14/2 (case still pending).
- <sup>xxiii</sup> ICSID Case No. ARB/12/12 (case still pending).
- <sup>xxiv</sup> PCA Case No. 2012-12 (case still pending).
- <sup>xxv</sup> ICSID Case No. ARB/10/7 (case still pending).
- <sup>xxvi</sup> ICSID Case No. ARB/07/5 (case still pending).
- <sup>xxvii</sup> ICSID Case No. ARB/08/9 (case still pending).
- <sup>xxviii</sup> ICSID Case No. ARB/07/8 (case still pending).
- <sup>xxix</sup> See, e.g., *Ralls Corporation v. Committee on Foreign Investment in the United States*, No. 13-5315 (D.C. Cir. July 15, 2014) (finding in favor Chinese-owned US company's claim that actions taken by the Committee on Foreign Investment in the United States (CFIUS) violated the investor's Constitutional due process rights).
- <sup>xxx</sup> Emma Aisbett, "Powerful Multinationals or Persecuted Foreigners? 'Foreignness' and Influence over Government Rule-Making" (2010) CEPR Discussion Paper No. 638.
- <sup>xxxi</sup> Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, "Trans-Atlantic Investment Treaty Protection," Centre for European Policy Studies, Special Report No. 102/March 2015.
- <sup>xxxii</sup> For more on political risk insurance in this context, see, e.g., Gerald T. West, "Political risk investment insurance: a renaissance," 5 J. PROJECT FINANCE 29 (1999); Lauge Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence," YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009-2010, OUP.
- <sup>xxxiii</sup> See Zoe Phillips Williams, "Risky Business or Risky Politics: What Explains Investor-State Disputes," INVESTMENT TREATY NEWS, Aug. 12, 2014.
- <sup>xxxiv</sup> Organization for International Investment, Foreign Direct Investment in the United States: 2014 Report, p. 3.
- <sup>xxxv</sup> *Id.*
- <sup>xxxvi</sup> *Id.*
- <sup>xxxvii</sup> This data is from Uniworld's database, and has been compiled by Public Citizen.
- <sup>xxxviii</sup> Office of the United States Trade Representative: Fact Sheets: Investor State Dispute Settlement (ISDS), March 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.
- <sup>xxxix</sup> *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)12/1, Hearing on Jurisdiction and the Merits, November 18, 2013, p. 40.
- <sup>xl</sup> *Id.*
- <sup>xli</sup> For more on this decision see Lise Johnson, "New Weaknesses: Despite a major win, arbitration decisions in 2014 increase the US's future exposure to litigation and liability" (CCSI January 2015), available at <http://ccsi.columbia.edu/2015/01/15/new-weaknesses-despite-a-major-win-arbitration-decisions-in-2014-increase-the-uss-future-exposure-to-litigation-and-liability/>.
- <sup>xlii</sup> See, e.g., *id.* (discussing how the tribunal declined to accept the state parties' position regarding the role of the most-favored nation provision). See also *Bilcon v. Canada*, PCA Case No. 2009-04, Award, Mar. 17, 2015 (not applying rules for assessing customary international law despite the NAFTA parties' clear and binding direction that the fair and equitable treatment standard is confined to customary international law).
- <sup>xliii</sup> Office of the United States Trade Representative: Fact Sheets: Investor State Dispute Settlement (ISDS), March 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.
- <sup>xliv</sup> Office of the United States Trade Representative (USTR): Fact Sheets: Investor State Dispute Settlement (ISDS), March 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.
- <sup>xlv</sup> Federal jurisprudence approaches these questions applying different tests depending on whether the alleged interference with property rights is a physical interference (the *Loretto* test), a "total" taking (the *Lucas* test), a partial taking (the three-part *Penn*

*Central* test), or a condition on development (the *Nollan/Dolan* tests). For a discussion of US law on regulatory takings, and a comparison with the doctrine of “indirect expropriation” under investment treaties, see Mathew Porterfield, “International Expropriation Rules and Federalism,” 23 STANFORD ENV’T L.J. (2004).

<sup>xlvi</sup> USTR, *supra* n. xliii. The US’s treaties do not expressly state that the fair and equitable treatment is limited to a denial of justice.

<sup>xlvi</sup> *Occidental v. Ecuador*, LCIA Case No. UN3467, Award, July 1, 2004, para. 191.

<sup>xlvi</sup> *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, para. 250.

<sup>xlvi</sup> See, e.g., Lise Johnson and Oleksandr Volkov, “Investor-state contracts, host-state ‘commitments’ and the myth of stability in international law,” (2013) 24:3, *American Review of International Arbitration*, 361-415.

<sup>i</sup> The APA’s provisions on judicial review are contained in 5 USC §§ 701-706.

<sup>ii</sup> 5 USC § 701(a)(1) & (2).

<sup>iii</sup> *Norton v. S. Utah Wilderness Alliance*, 542 US 55, 66 (2004); see also Anna T. Katselas, “Do Investment Treaties Prescribe a Deferential Standard of Review?, A Comparative Analysis of the US Administrative Procedure Act’s Arbitrary and Capricious Standard of Review and the Fair and Equitable Treatment and Arbitrary or Discriminatory Measures Treaty Standards,” 34 MICH. J. INT’L L. 87, 95

<sup>iii</sup> See also Katselas, *supra* n. lii, at 132 (The “comparison [between ISDS cases and claims under the APA] further illustrates that investment tribunals are not subject to the significant public law limitations that constrain US courts in APA review.”).

<sup>lii</sup> *Heckler v. Chaney*, 470 US 821, 831 (1985)

<sup>lii</sup> *Id.* at 831-32.

<sup>lii</sup> It “is black-letter administrative law that in an [Administrative Procedure Act] case, a reviewing court should have before it neither more nor less information that did the agency when it made its decision.” *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (internal citations and quotation marks omitted; alteration in original); see also *Fla. Power & Light Co. v. Lorion*, 470 US 729, 743 (1985) (in applying the arbitrary and capricious standard under the APA, “[t]he focal point for judicial review should be the administrative record already in existence . . . .” (quoting *Camp v. Pitts*, 411 US 138, 142 (1973))). While the basic rule is to prevent consideration of extra-record evidence, federal courts have identified certain narrow circumstances in which it may be allowed. One is in cases when the agency is alleged to have acted in bad faith. Yet “normally there must be a strong showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decision makers.” *Pub. Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982).

<sup>lii</sup> See *Apotex Holdings*, *supra* n. xxxix, paras. 8.61-8.77. The tribunal notes that the US urged deference, but does not engage in any substantial discussion of the proper standard of review. Moreover, in its analysis, it reviews extra-record information on the facts and law that was prepared for the investment arbitration, including testimony of FDA officials and expert submissions on domestic law.

<sup>lii</sup> *Bilcon v. Canada*, Award, March 17, 2015, para. 591.

<sup>lii</sup> *Bilcon v. Canada*, Government of Canada – Rejoinder, March 21, 2013, para. 137.

<sup>lii</sup> *Bilcon v. Canada*, Dissenting Opinion of Professor Donald McRae, March 10, 2015, para. 48.

<sup>lii</sup> Arbitral awards issued under the ICSID Convention may only be annulled on five narrow grounds; Errors of fact or law are generally not considered to be among those grounds. Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159 (1965), art. 52. Arbitration awards issued under the NY Convention may similarly only be challenged upon enforcement if set aside under the law of the jurisdiction in which the arbitration award was rendered, or if one of other identified grounds is established, none of which is or is typically interpreted to be an error of fact or law. See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1968), art. V.

<sup>lii</sup> Thomas O. Main, “The Procedural Foundation of Substantive Law,” 87 WASH. U.L. REV. 801, 815 (2014):

<sup>lii</sup> Scott M. Matheson, Jr., “Procedure in Public Person Defamation Cases: The Impact on the First Amendment,” 66 TEX. L. REV. 215, 223 (1987)

<sup>lii</sup> In the US, data shows that regulatory takings claims usually fail before they reach a decision on the merits or the substance, showing the importance of non-substantive rules. One study examining all regulatory takings cases from three different circuits in which the decision cited the key *Penn Central* test found that pre-merits dismissals were significant:

In the courts of appeals, the merits were reached by the First Circuit in 8 out of 20 cases (40.0% of cases), by the Ninth Circuit in 16 out of 68 cases (23.5%), and by the Federal Circuit in 21 out of 74 cases (28.4%). In the trial courts, the merits were reached by First Circuit trial courts in 14 out of 35 cases (40.0%), by the Ninth Circuit trial courts in 27 out of 71 cases (38.0%), and by the Court of Federal Claims in 70 of 223 cases (31.4%).

Adam R. Pomeroy, “Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?”, 22 FED. CIR. B.J. 677, 692.



Success among those cases that were decided on the merits was 11.9%. Overall success in all regulatory takings cases citing Penn Central was 4.0%. In his article, the author refers to similar studies that have likewise found a low chance of success on regulatory claims.

<sup>lxv</sup> These doctrines operate as a narrow exception to the “virtually unflagging” obligation of federal courts to exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 817 (1976).

<sup>lxvi</sup> *Exxon Mobil v. Saudi Basic Indus. Corp.* 544 US 280, 284 (2005).

<sup>lxvii</sup> One exception to this is habeas petitions, which can be brought in federal district court to challenge state court decisions.

<sup>lxviii</sup> In some US circuits, the courts apply a “fraud exception” to the doctrine, allowing plaintiffs to challenge a state court judgment in federal courts if the judgment was secured by fraud. For a discussion of this exception, see, e.g., Steven N. Baker, “The Fraud Exception to the Rooker-Feldman Doctrine: How It Almost Wasn’t (and Probably Shouldn’t Be),” 5 FED. CTS. L. REV. 139 (2011).

<sup>lxix</sup> The practice of investors using investor-state arbitration to challenge court decisions in cases between the investors and private parties are growing. The various disputes where this can be seen include *Chevron v. Ecuador* (PCA Case No. 2009-23), *Eli Lilly v. Canada* (ICSID Case No. UNCT/14/2), and *Awdi v. Romania*, ICSID Case No. ARB/10/13.

<sup>lxx</sup> Notably, the individual who had brought the suit could not be a party to the investor-state arbitration even though the validity of the very court judgment she had obtained would be directly at issue. Indeed, as a non-party, she would not even have right to attend or make submissions in the dispute, or the power to determine whether to accept or reject a settlement offer given by the investor in that ISDS proceeding. The most the individual could hope for would be to participate as an “amicus curiae” able to make written or oral submissions to the tribunal; but this is a much narrower role than a role as an actual party to the litigation and even this route of participation is uncertain: Whether she could in fact participate would be decided at the tribunal’s discretion. There is no right to participate as amicus curiae.

<sup>lxxi</sup> The *Burford* abstention doctrine can also apply in damages actions. The Supreme Court stated in *Quackenbush v. Allstate*:

We have not strictly limited abstention to “equitable cases,” but rather have extended the doctrine to all cases in which a federal court is asked to provide some form of discretionary relief. ... Moreover, as demonstrated by our decision in *Thibodaux*, ... we have not held that abstention principles are completely inapplicable in damages actions. *Burford* might support a federal court’s decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law.

*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730-731 (1996) (internal citations omitted).

<sup>lxxii</sup> *New Orleans Public Service, Incorporated v. Council of City of New Orleans*, 491 US 350, 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 US 800 (1976)).

<sup>lxxiii</sup> *Burford v. Sun Oil Co.*, 319 US 315, 327 (1943).

<sup>lxxiv</sup> As tribunals have interpreted investment treaties, exhaustion is not a prerequisite for jurisdiction. However, whether claimants exhaust local remedies may in some cases affect their ability to ultimately succeed on certain claims, in particular on fair and equitable treatment claims. The extent to which investors have pursued domestic remedies has not similarly affected analysis of other claims, such as national or most-favored nation treatment claims. See, e.g., *Apotex Holdings*, *supra* n. xxxix.

<sup>lxxv</sup> For a discussion of these issues see, e.g., David Gaukrodger, Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, OECD Working Papers on International Investment 2013/03. The US has taken the position that treaties do not permit non-controlling shareholders to bring claims for harms to the company. Tribunals, however, have rejected that argument in disputes under treaties concluded by the US. See *id.*

<sup>lxxvi</sup> See, e.g., *Bilcon v. Canada*, Procedural Order No. 13, July 11, 2012 (looking to NAFTA jurisprudence, applicable arbitration rules, and rules developed by the International Bar Association on taking of evidence in international arbitration to determine the extent to which the deliberative process privilege applied); *Apotex Holdings*, *supra* n. xxxix, Procedural Order on the Parties’ Respective Requests for Document Production, Mar. 29, 2003, pp. 24-26; *id.*, Procedural Order on Document Production Regarding the Parties’ Respective Claims to Privilege and Privilege Logs, July 5, 2013, paras. 20-22.

<sup>lxxvii</sup> *Colorado River Water Conservation Dist. V. United States*, 424 US 800, 814 (1976).

<sup>lxxviii</sup> *Erie R.R. v. Tompkins*, 304 US 64 (1938).

<sup>lxxix</sup> *Id.* at 74.

<sup>lxxx</sup> *Id.* at 74-75.

<sup>lxxxi</sup> *Id.* at 75.

<sup>lxxxii</sup> The Supreme Court in *Erie* highlighted how companies would manufacture their foreignness: A company operating in State A would purposefully incorporate in State B in order to be considered a non-citizen in State A. These same practices occur in ISDS, with individuals and entities setting up companies in certain countries in order to gain the protections of those countries investment treaties.

<sup>lxxxiii</sup> Poulsen et al., *supra* n. xxxi at p. 15.



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